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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 750

SALVATORE GRANELLO and HYMAN LEVINE,
Petitioners,

—v.—

UNITED STATES OF AMERICA,
Respondent.

PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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PETITIONERS' REPLY

—A—

The government's sparse opposition to the petitioners' petition for certiorari to the United States Court of Appeals, Second Circuit in essence is an acknowledgment of its inability to answer the serious constitutional problems posed by this appeal.

The respondent argues that the government has the right to use evidence which concededly has been obtained by an unlawful search and seizure against the entire world, except the immediate victim of the illegality. This is despite the fact that in the case at bar, the evidence was *not contraband* and was adjudicated to have been unlawfully seized and ordered returned to the victim (Birrell, petitioners' attorney and co-conspirator).

This Court, it is submitted, never sanctioned *exploratory* searches in any case, including *Wong Sun* v. *United States,*

371 U.S. 471. The government's argument that *Wong Sun* is a precedent for such an interpretation is unwarranted, especially in the instant case where no contraband is involved.

If the respondent actually believes that it has the right to conduct exploratory searches and seizures, then to a significant extent, the Fourth Amendment is meaningless. What home is safe—what good is the Fourth Amendment if by the ruse of searching elsewhere, the government can look for evidence against anyone it chooses? When the government contends that the use of illegally seized evidence is warranted for all purposes, except against the immediate victim, then there is virtually no protection from the transgressions of a police state.

The government argues that there was no proof that Birrell was the attorney for the petitioners, but an "officer of the Court" advised it to the contrary and expressly stated that Birrell was their attorney. (See Petition pp. 27, 28.) The petitioners have written to the Solicitor General advising him of the fact that documents known to the government exist which would establish this fact even more than the representation so made.

The District Court failed to permit an evidentiary hearing on the question of "attorney-client" relationship and likewise failed to hold any hearing on the issue of "standing" or the unlawful search and seizure of the Birrell records, despite the fact that Birrell was petitioners' attorney and was also admittedly named as a co-conspirator.

The blatant violation of constitutional rights herein cannot be condoned in the name of efficient law enforcement, because once the government itself may become a law-

breaker with impunity, then will the erosion of the Bill of Rights commence and lawlessness pervade the land.

There is absolutely no doubt that the Birrell records were a *sine qua non* to the convictions herein. In District Judge Dimock's opinion he alleges (App. 18a):

> "... I think it is *undisputed* that no conviction could have been obtained without this evidence" (the Birrell records).

—B—

The evidence adduced at the trial of the petitioners so far as the government's case was concerned, sought to prove that a joint venture existed—actually a "conspiracy". It was clear that without the ability to establish that Granello and Levine *jointly* owned 80% of the Pacheco stock, there could not possibly have been a conviction. The judge in fact told the jury to acquit unless such joint venture was found to exist (S.M. 2989; G-App. 18a).

The respondent has conceded that a microphone was installed by trespass in a commercial establishment partly owned by petitioner Levine (Resp. Opposition brief, pp. 16, 17). The respondent alleges that no useful information was thus obtained. This cannot be assumed without a full inquiry and hearing during a new trial. But, if Levine's rights were in anyway violated, then Granello is equally prejudiced as the entire theory of the Government is that they acted "jointly" and evidence as to one is damaging as to the other.

The government completely overlooks the possibility that poisoned "fruits" of this illegal "bugging" may have been used against Granello and Levine. Under the reason-

ing of *Black* v. *United States*, 385 U.S. 26, only a reversal can adequately protect the rights of the petitioners.

The respondent very "cutely" says that no "direct" electronic surveillance of Granello occurred (Resp. Opposition p. 16). This is a "negative-pregnant" and infers that indirect surveillance did occur. Since Granello and Levine could not possibly have been convicted separately, but only jointly, any illegality as to one, necessarily taints the conviction of both. The only other course would have been for the government to have consented to a severance after the conspiracy charges were dismissed, but this they did not do. The case therefore stands or falls on the joint ownership of 80% of Pacheco stock—separately neither owned enough.

The cumulative illegality should also be considered—i.e., the illegally seized Birrell evidence and the illegal bugging. In addition, it is submitted that the government apparently also suppressed or failed to advise the petitioners of exculpatory material under *Brady* v. *Maryland*, 373 U.S. 83.

In the record it is apparent that in addition to failing to produce an important exhibit (Levine NN) before the jury as requested during its deliberations, the government also had a vast storehouse of Birrell records which were housed in a room as large as a Courtroom, but failed to give the petitioners' attorneys any inventory to meaningfully sift through these voluminous records. Apparently an inventory has been extant since 1961 according to information received by the petitioners which consists of almost 300 or more pages. The record at trial indicates that requests were made, in effect, for such inventories, but were denied. (S.M. 1098-1108; S.M. 3-12—See Exhibit "A" annexed).

The record also indicates that there was other exculpatory material which witnesses saw among the government papers, but which the government failed to produce for the petitioners (S.M. 3003-3009; 1260-1272; 1280-1282; 1777-1778; 1780-1790).

A search of the Birrell records with the inventory as a guide would undoubtedly have shown that the law firm of Birrell and Larson had represented the petitioners and had custody of many of their papers in a confidential capacity.

In sum, therefore, it is manifest that the entire case of the government against the petitioners rests on admittedly illegally seized evidence, illegal "bugging" and what amounts to suppression of exculpatory material.

The petition for certiorari should be granted.

Respectfully submitted,

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EXHIBIT A

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(1106) AFTERNOON SESSION—2.15 P.M.

The Court: Is there anything before the jury comes in?

Mr. Germaise: Well, I want to report to your Honor that Mr. Stillman took me up to this room 501, which is a room about twice the size of this courtroom and it is just packed from front to back with file cabinets, cartons and boxes.

Some of the cabinets are open, some are locked. Some of the cartons are tied with string. It is a Herculean task to even get to look through one of those cabinets, much less go through all of them, and the cartons and boxes.

Some of them are on top of boxes, some of them are on top of cabinets, and I will say I did not find the book I was looking for, nor was I able to look for these other checkbooks that I was going to ask the witness about.

The papers are there but I will say that there are millions upon millions of files in those cabinets and cartons and files and there are metal and cardboard boxes just crammed with files. It (1107) would take eons and eons of time to go through them.

Mr. Stillman has commented to me that he would permit me to go through them again on Wednesday, the day we are not sitting. I will try then—

The Court: Were you able to find any of these logs you were talking about?

Mr. Germaise: No, no, Mr. Stringile wasn't there. It was locked. Mr. Stillman got a key from his office. But the man wasn't there, your Honor.

Now Judge Palmieri ordered that a log be kept—

The Court: As I caught the drift of it, there was a log of papers which were taken out of the room.

Mr. Germaise: Yes, sir; yes, sir. Well, the first log was the papers coming back into the room before this custodian was appointed.

The Court: Yes, all right.

Mr. Germaise: And from then on anybody who took anything out had to sign for it.

The Court: There is no inventory?

Mr. Germaise: Well, sir, the custodian (1108) informs me that there was an inventory made by the law firm of Simpson, Thacher & Bartlett. They spent months inventorying the documents, but I understand also that they will not make their inventory public.

The Court: Yes, all right. Call the jury.

Mr. Stillman: Just one thing before the jury comes in.

If I said anything this morning that was out of line I would like to apologize for it.

The Court: All right.

(Jury enters courtroom.)

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